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Supreme Court of the United States

OCTOBER TERM, 1941

S. M. E. SIMON *Petitioner,*

Versus

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND SUPPORTING BRIEF.

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E. GAUJOT BIAS,
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Williamson, West Virginia
November 5, 1941

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INDEX

THE PETITION

	Page
Opinion Below	1
Jurisdiction	1
Explanation Concerning Record	2
Statutes Involved	2
Questions Presented	3
Reasons Relied On For The Writ	3
Statement of the Case	8

THE BRIEF

SUMMARY OF ARGUMENT		13
ARGUMENT		14
I.	The Decision is in Direct Conflict with Decisions of Other Circuit Courts of Appeals	14 to 18
II.	In Direct Conflict with the Decisions of the Supreme Court	19 to 21
	Or	
III.	The Decision Decides an Important Federal Question which this Court has not, but should settle	21
IV.	The Decision is in Direct Conflict with the same Court's earlier Decisions	21 to 22
V.	The Fact the Prejudicial Improper Evidence was elicited by Cross-examination of the Defendant does not render it less erroneous	22 to 30
VI.	Additional Errors in Opinion Considered	30 to 32
VII.	The admission of the Incompetent Evidence calls for Reversal	33 to 38
VIII.	The Fact Proper Particularization was not made of the Error in Admission of Evidence about Passport in 1927 will not prevent this Court from Noticing and Correcting an Error so vital to Petitioner's Case	38 to 43

CITATIONS

Cases	*Page*
Baish v. U. S., 70 Fed. 2nd 988	14
Blaustein v. U. S., 44 Fed. 2nd 162	14
Borum v. U. S., 56 Fed. 2nd 230	15
Boyd v. U. S., 35 Law. Ed. 1077-1080	19
Brashfield v. U. S., 71 Law. Ed. 345-346	42
Caldwell v. U. S., 78 Fed. 2nd 78	14, 21
Clark v. U. S., 24 Fed. 2nd 696	43
Clyatt v. U. S., 49 Law. Ed. 731-732	42
Coulston v. U. S., 51 Fed. 2nd 178	30-31
Crawford v. U. S., 53 Law. Ed. 465	43
Cromley v. U. S., 8 Fed. 2nd 118	14
Danaher v. U. S., 39 Fed. 2nd 325	41
Edwards v. U. S., 18 Fed. 2nd 402	14
Eley v. U. S., 117 Fed. 2nd 528	17
Fish v. U. S., 215 Fed. 551-552	14
Giantos v. U. S., 104 Fed. 2nd 929	14
Hood v. U. S., 59 Fed. 2nd 153	14
Houghton v. Jones, 17 Law. Ed. 503	24, 27
Lamento v. U. S., 4 Fed. 2nd 904	39
Little v. U. S., 93 Fed. 2nd 401	24, 27
Little v. U. S., 73 Fed. 2nd 866	36
McCandless v. U. S., 80 Law. Ed. 1205	36
Mackreth v. U. S., 103 Fed. 2nd 495	14
MacLafferty v. U. S., 78 Fed. 2nd 715	14
Mansbach v. U. S., 11 Fed. 2nd 221	14
Molineux Case, 168 N. Y. 264	15
Niederluecke v. U. S., 21 Fed. 2nd 511	14
Neff v. U. S., 105 Fed. 2nd 688	14
Pullman Co. v. Hall, 55 Fed. 2nd 784	23
Raffel v. U. S., 70 Law. Ed. 1054	20, 23
Ray v. U. S., 114 Fed. 2nd 508	41
Simpkins v. U. S., 78 Fed. 2nd 594	14, 21
U. S. v. Strader, 72 Fed. 2nd 590	41
U. S. v. Stewart, 104 Fed. 2nd 234	14
Suhay v. U. S., 95 Fed. 2nd 890	41
Sutherland v. U. S., 92 Fed. 2nd 305	24, 29
U. S. v. Atkinson, 80 Law. Ed. 557	40
U. S. v. Dressler, 112 Fed. 2nd 977	14
U. S. v. Glasser, 116 Fed. 2nd 690-702	24, 29
U. S. v. Sayer, 49 Fed. 2nd 723	31
U. S. v. Weiss, 103 Fed. 2nd 348	14, 24

Page

Vause v. U. S., 53 Fed. 2nd 346 14
Vicksburg & M. R. R. Co. v. O'Brien, 30 Law. Ed. 299 .. 36
Walker v. U. S., 104 Fed. 2nd 465 ..... 14, 22
Weil v. U. S., 2 Fed. 2nd 145 14
Weiner v. U. S., 20 Fed. 2nd 522 ..... 24, 28
Williams v. Great So. Land Co., 72 Law. Ed. 761-767 ... 37
Wiborg v. U. S., 41 Law. Ed. 298 40

STATUTES

Title 11 (Bankruptcy), U. S. C. A., Sec. 52b (1) and (2).
Title 26 (Internal Revenue), U. S. C. A., Sec. 145a.
Title 22 (Passports), U. S. C. A., Sec. 220.
All are made Appendix No. 1 ..... Page 45

TEXTS

Page

American Law Institute, Code of Evidence, Rule 106 24
22 C. J. S., pp. 1084-1087 17
23 C. J. S., pp. 1216-1218 9
24 C. J. S., Sec. 1915, pp. 954-957 37
24 C. J. S., Sec. 1672, p. 289 42
English Crim. Ev. Act, Art. 56 24-25
(This entire Section is Appendix No. 3) 47-48
Jones on Evidence (Fourth Edition) 24, 27
Minor on Real Property, Vol. 1, p. 613 9
New Standard Dictionary ("Conduct") 32
Pomeroy's Equity Jur., Sec. 1039 9
Roscoe's Crim. Evidence (Eleventh Edition) 24, 26
28 R. C. L., p. 621 ..... 24, 26
28 R. C. L., p. 607 26
Underhill on Crim. Evidence (Fourth Edition) 16
Wharton's Crim. Evidence (Tenth Edition) 15, 42
Wigmore on Evidence 15, 24
(One Section is made Appendix No. 2) 46-47

No. .....

Supreme Court of the United States

OCTOBER TERM, 1941

S. M. E. SIMON *Petitioner,*

Versus

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Szin Mos Eisen Simon, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in this cause on October 10, 1941, affirming the judgment of the United States District Court for the Southern District of West Virginia.

OPINIONS BELOW

The trial court filed no opinion. At this writing the opinion of the Circuit Court of Appeals has not been officially reported. A copy of its opinion is made a part of the printed record (P. R. 234-241).

JURISDICTION

Petitioner invokes the jurisdiction of this court under the provision of Section 240(a) of the Judicial Code (Title 28, sec. 347 U. S. C. A.), as amended by Act of February 13, 1925, and under this court's Rule XI., now effective.

EXPLANATION CONCERNING RECORD

Under the procedure followed in the Fourth Circuit, the record made in the trial court need not be, and, in practice, is not printed upon appeal. The record upon appeal consists of a typewritten copy of the proceedings in the trial court, a typewritten transcript of the reporter's notes of the evidence, with exhibits, all certified to the appellate court by the Clerk of the trial court (Rule 10 Circuit Court of Appeals, Fourth Circuit). Under the rule (10-E), the parties print, as appendices or supplements to the briefs, only such portions of the record as "are material to the questions presented." Under Sections 7 and 8 of Rule 38 of this court, petitioner and respondent, by stipulation (Printed Record 245), agree that upon hearing on this petition the printed record shall consist of (a) the printed portion of the record used in the Circuit Court of Appeals, (b) the proceedings in the Circuit Court of Appeals, and (c) the matters stipulated as shown in the stipulation. The entire record before the Circuit Court of Appeals is here, however, certified by the Clerk of that court, and, by the stipulation, made the record here.

When reference is made herein to that portion of the record which is printed, it will be designated P. R. — e. g. (P. R. 12), and when the typewritten (the whole) record is referred to, it will be cited R.—e. g. (R. 112).

STATUTES INVOLVED

Title Eleven, Sec. 52, sub-sections b-1 and b-2 (Bankruptcy).
Title 22, Sec. 220 U. S. C. A. (Passports).
Title 26, Sec. 145 U. S. C. A. (Income Tax).

All are set out in Appendix No. 1.

QUESTIONS PRESENTED

1. Whether or not the accused in a criminal trial, while a witness for himself, when no evidence as to his good character, or tending to prove good character of the accused, was offered or given, can, on cross-examination, be questioned and examined concerning other alleged crimes committed by him, which crimes were wholly independent of, and in nowise related to, the charge on which he was tried; and which evidence, so adduced on cross-examination, had no tendency to prove or disprove accused's guilt or innocence of the charge on trial.

2. Whether the admission of such evidence so obtained, over petitioner's objection, resulting in his conviction, affirmed by the Circuit Court of Appeals, is not reversible error, as amounting to a denial of petitioner's right to a fair trial.

REASONS RELIED ON FOR THE WRIT

Petitioner was tried on an indictment in seven counts, charging, in the first five counts, concealment of assets from his trustee, and, in the last two counts, false swearing (P. R. 1). He took the stand as a witness in his own behalf, and categorically and emphatically denied all the charges and gave logical evidence in support of his denial, which evidence was amply supported by many other witnesses, most of them wholly disinterested. He gave no evidence and offered no evidence as to his own good character (P. R. 246, Stipulation 2). Notwithstanding this, while he was being cross-examined by the Assistant District Attorney, he was questioned, and answered questions, concerning three other wholly unrelated, independent crimes or offenses, which the questions and answers tended to show he had committed, and the evidence as to which bore no relation to the charge on which he was tried, and had no tendency whatever to show he was guilty or innocent of the charges being tried.

1. Under cross-examination by the Assistant District Attorney, the following evidence was adduced.

Mr. Love: Q. "Dr. Simon, I hand you a certified photostatic copy of an income tax return for the year 1937, purporting to be a joint return of Dr. and Mrs. S. M. E. Simon, I ask you to identify that, if you can, as the joint return made for the calendar year 1937 by yourself and Mrs. Simon."

A. "Yes, sir." (P. R. 76).

This was objected to by petitioner's counsel, but the record indicates the objection was not insisted upon.

Later, the wife testified (P. R. 117) that in 1935 she bought real estate at Logan, for which she paid "eleven thousand and some dollars" (other witnesses testified the purchase price was eleven thousand dollars); and (P. R. 147) that it was sold in 1937 for fifteen thousand dollars. The cross-examiner caused petitioner to say the return was sworn to by petitioner and his wife, and that it did not show any four thousand dollar profit made on this real estate transaction (P. R. 76-77).

Here was the introduction of inadmissible evidence, on cross-examination, as to a matter not adverted to or touched on in the examination in chief, which bore no relation to the charge on which petitioner was being tried and could have no probative value on the issues raised by the indictment. It was an attack on petitioner's character, and at least had a tendency to incriminate him and cause the jury to believe the accused guilty of other crimes, to petitioner's prejudice. If in fact petitioner had failed to make a correct return, or wilfully failed to pay taxes owing, then he had violated Title 26, Section 145; and we submit such evidence was inadmissible, highly improper and prejudicial.

2. Further in the cross-examination of the petitioner, counsel for the government interrogated him about an income tax return for 1936 (R. 1169-1170). This occurred:

> *Mr. Love:* Q. "Dr. Simon, I ask you to identify, as maybe you have already done, the certified photostatic copy of your individual income tax return for the calendar year 1936."

This was objected to. Objection overruled.

And the ruling of the court on the whole examination excepted to (R. 1172). The court finally admitted it, "It may be considered, however, by the jury in determining the veracity or truthfulness of the witness" (R. 1172). Petitioner had, upon questioning, admitted he signed the return. A. "Yes, sir, that is my signature" (R. 1170).

Here, again, was a flagrant violation of petitioner's rights, the introduction of evidence tending to show he had violated another federal criminal statute (Title 26, Sec. 145), which evidence, and which alleged crime, bears no relation to, and had no tendency to prove, the issue, the charge on which petitioner was being tried.

Since this evidence concerning the 1936 return is not made a part of the printed portion of the record, and for the convenience of the court, we here set out Section 4 of the stipulation of counsel concerning the record (P. R. 246):

> (It is hereby stipulated and agreed) "That the petitioner objected to the offer in evidence of the 1936 income tax return, and saved an exception to the ruling of the court admitting it on the question of defendant's veracity and the weight of his evidence, but did not include such objections and exceptions in the appendix to his brief in the court below" (meaning in the Circuit Court of Appeals).

3. While petitioner was being cross-examined by the prosecutor, and without preliminary, counsel exhibited a paper to petitioner, and this evidence was adduced (P. R. 83-84).

Mr. Love: Q. "I ask you to identify this passport, if you can."

A. "Yes, sir."

Q. "I ask you to identify this application for immigration visa, non-quota, made at Budapest, Hungary, to the American Consular Service."

A. "Yes, sir."

Q. "In January, 1927."

A. "Yes, sir."

* * *

Q. "What date does it say you were born, Doctor?"

A. "This one says May 19, 1907."

Q. "When were you born, Doctor, in 1900 or 1907?"

A. "I was born August 6, 1900."

(The petitioner, in his examination in chief, had already said he was born in 1900). Here, again, the prosecution sought to prejudice the jury against petitioner by the introduction of evidence, wholly inadmissible, as we contend, showing, or tending to show, petitioner had been guilty in 1927 of violating another federal criminal statute (Title 22, Sec. 220—Foreign Relations and Intercourse—Passports).

Of course, petitioner's age, or what he said or testified about his age, either in 1927 or 1940, could not possibly

have any probative value or be competent evidence as to his guilt or innocence of the charge of concealing assets from his trustee in bankruptcy, or the charge of false swearing in relation to such assets.

The sole purpose was to discredit petitioner and cause the jury to believe he was of general bad character, and, because thereof, guilty of the charge on which he was being tried, and, therefore, should be convicted.

It is true that, through inadvertence or oversight, petitioner's counsel failed formally to object to the introduction of the evidence concerning the passport; but, notwithstanding this, as we hereinafter point out, its admission, as incompetent, improper and prejudicial, will, in our opinion, be recognized and noticed by this court, for the reasons to be stated, and the error, in its omission, cured and corrected.

Because of these three instances of the admission of evidence of other crimes or offenses, in no way related to, but wholly independent of, the crimes charged in the indictment, which evidence was wholly irrelevant, and in no sense proper cross-examination, it is respectfully submitted the writ of certiorari should be issued and the decision of the Circuit Court of Appeals should be reviewed and reversed.

(A) The decision of the Circuit Court of Appeals is in direct conflict with the decision of other Circuit Courts of Appeals on the same matter.

(B) The decision is in conflict with the applicable decisions of this court,

Or

(C) The decision has decided an important question of federal law which has not been, but should be, settled by this court.

(D) The decision of the Circuit Court of Appeals is in direct conflict with its own earlier decision on the same question.

STATEMENT OF THE CASE

Petitioner, after working his way through colleges in Austria and Germany, obtained his medical degree, and served his interneship at Liepzig. To escape the persecutions of middle Europe, he came to the United States in 1928, with a small sum of money ($445.00) and some medical books and equipment, worth perhaps fifty dollars (R. 1052).

Here he worked in three different hospitals, until 1934, at salaries of One Hundred Twenty-five Dollars ($125.00), One Hundred Fifty Dollars ($150.00), and One Hundred Sixty Dollars ($160.00) the month.

In 1932, he married a widow, who had two daughters, and who was herself a graduate of a medical school in Rumania. Her parents were well-to-do or wealthy, and from them, and the estate of her first husband, she had and received about Seventy Thousand Dollars ($70,000.00) (R. 640-1000-1210) (P. R. 99, 113, 128).

Mercy Hospital, at Logan, West Virginia, was equipped by the wife, operated for more than a year, and sold at a loss (P. R. 110).

About January 1, 1936, Mercy Hospital, at Williamson, was opened. The leased building was improved and the hospital equipment bought by the wife. At first it was unincorporated, but in March, 1938, was made a corporation, and when petitioner's bankruptcy proceedings ensued, and for several months prior thereto, Mrs. Simon owned all but two shares of the stock in the corporation.

At Logan a residence property was bought by Mrs. Simon, and later sold. At Williamson certain pieces of real estate were purchased by the wife, and in every instance title was vested in her. The government, at the trial, introduced charts showing that some money earned by the petitioner helped to pay for some of the real estate, and it was charged in the indictment that she held, and holds, this in trust for petitioner. Mrs. Simon categorically denied this (P. R. 137-138), and the record, we think, entirely supports her in this. There is no suggestion of an express trust, and, therefore, the government's contention is that there is a constructive or resultant trust. Always the presumption is when a husband pays or aids in paying for real estate, with title in the wife, that his contribution is a gift. Vol. 3, Pomeroy's Equity Jur., Sec. 1039, p. 2354; Vol. 1 Minor on Real Property, pp. 613, 614; 23 C. J. S. 1216-1218.

As early as 1936 (shortly after petitioner and his family moved to Williamson, and two years or more before the bankruptcy), both the petitioner and his wife explained to one Taylor, a teller in a local bank, who sought their account, that all the moneys and properties owned by the family belonged to Mrs. Simon (P. R. 31-32). If the court would know whose money bought the real estate, established and operated the hospitals, it will learn this from the evidence of Mrs. Simon (P. R. 79-144) and the evidence of Roy Taylor (P. R. 11-58).

When the hospital was incorporated (March, 1938), all the accounts owing to it and to the petitioner were assigned to the corporation, including the assets petitioner was charged, in Counts One (1) and Two (2), with concealing. The item covered by Count One (1) is Government's Exhibit 11A, and is a note of Seventy-five Dollars ($75.00), which plainly shows it was endorsed over to the corporation by the petitioner. The account petitioner is

charged in Count Three (3) with concealing from his trustee was in February, 1938 (eight months before bankruptcy), assigned by petitioner to his wife to reimburse her for an attorney's fee paid by her for him. This assignment is Defendant's Exhibit No. 8, and made part of the record (R. 721). Count Four (4) charges concealment of an account of Two Hundred Seventy-two Dollars and Thirty Cents ($272.30) owing by Howard Collieries Hospital and Burial Fund. This also had been assigned to the wife in December, 1937 (P. R. 25-26), and a letter written January, 1938 (nine months before bankruptcy—procured from counsel for the government), by petitioner to Smith, a witness, filed as Defendant's Exhibit No. 9, plainly shows this (R. 890).

In 1937 and 1938, several damage suits were instituted in the State Court against petitioner, alleging malpractice. Petitioner contends these were inspired by professional rivals (Government's Exhibit No. 1 — Petition in Bankruptcy).

Petitioner's attorney then, misconceiving the law, advised him to take voluntary bankruptcy to prevent such actions or prevent recoveries in the actions (P. R. 126).

A petition was prepared and filed. It listed liabilities of over Forty-six Thousand Dollars ($46,000.00), but included in this was the damage laid in two tort actions, Sellards Twenty Thousand Dollars ($20,000.00), and Zadick Four Thousand Dollars ($4,000.00). Also included was Fifteen Thousand, Seven Hundred Dollars ($15,-700.00) owing his wife, and Five Thousand Dollars $5,000.00) owing his brother-in-law, Martin Abraham. Exclusive of these items, the listed liabilities amount to only about Fifteen Hundred Dollars ($1500.00). All his liabilities were paid and satisfied by his wife long before the indictment, and before either the petitioner or his

wife knew any effort was being made to find evidence against petitioner upon which to base a criminal charge (P. R. 127-130).

Therefore, this is unlike most cases, where it is charged a bankrupt has concealed assets, *for here no creditor has suffered loss.*

The trial of petitioner required eight days, more than fifty witnesses were examined, the record covers fourteen hundred pages, and hundreds of exhibits were filed.

When the government rested, the defendant moved the court for a directed verdict of acquittal as to each count in the indictment, and renewed this motion when all the proof was in. Both motions were overruled, as were the motions for a new trial and in arrest of judgment.

The admission of the incompetent and prejudicial evidence here complained of was made a ground for a new trial in the motion to the trial court, and was one of the three grounds in support of petitioner's argument for reversal by the Circuit Court of Appeals (P. R. 240 — Court's Opinion).

What has been said under this head is considered proper in order that the court may have an understanding of the case as tried in the trial court.

We pass now to the brief in support of the questions presented, which questions we earnestly submit, as to the first, should be answered in the negative, and, as to the second, should be answered in the affirmative.

WHEREFORE, and because of what is to be now said in the supporting brief, it is respectfully submitted

that the prayer of this petition for a writ of certiorari should be granted.

Respectfully submitted,

RANDOLPH BIAS,
E. GAUJOT BIAS,
Counsel for Petitioner.

Williamson, West Virginia
November 5, 1941

BRIEF

SUMMARY OF ARGUMENT

The writ should be issued and the decision be reviewed and reversed,

Because:

I. The admission of evidence tending to prove petitioner had committed other unrelated and independent crimes is in direct conflict with the decisions of other Circuit Courts of Appeals.

II. The decision approving the admission of such evidence is in conflict with the applicable decisions of this court,

Or

III. The decision has decided an important question of federal law which has not been, but should be, settled by this court.

IV. The decision is in direct conflict with the court's (Fourth Circuit) own earlier decisions.

V. Nor does the fact the evidence was adduced from petitioner on his cross-examination render it admissible or cure the error in the decision.

VI. The opinion of the Circuit Court of Appeals examined, and certain error therein discussed.

VII. The admission of the incompetent evidence was clearly prejudicial to petitioner's case, and undoubtedly influenced the verdict of the jury.

VIII. Since the admission of evidence concerning the passport in 1927 was highly prejudicial to petitioner on the issues raised by the indictment, the court will notice it, although it was not at the time objected to by petitioner.

ARGUMENT

I.

The decision is in direct conflict with the decisions of other Circuit Courts of Appeals insofar as it approved the admission of evidence showing, or tending to show, the accused had committed other wholly unrelated and independent crimes.

Fish v. U. S., 215 Fed. 551-552 (First Circuit).
U. S. v. Weiss, 103 Fed. 2nd 348 (Second Circuit).
Vause v. U. S., 53 Fed. 2nd 346 (Second Circuit).
Blaustein v. U. S., 44 Fed. 2nd 162 (Third Circuit).
Mansbach v. U. S., 11 Fed. 2nd 221 (Third Circuit).
Walker v. U. S., 104 Fed. 2nd 465 (FOURTH CIRCUIT).
Caldwell v. U. S., 78 Fed. 2nd 78 (FOURTH CIRCUIT).
Simpkins v. U. S., 78 Fed. 2nd 594 (FOURTH CIRCUIT).
Mackreth v. U. S., 103 Fed. 2nd 495 (Fifth Circuit).
Weil v. U. S., 2 Fed. 2nd 145 (Fifth Circuit).
U. S. v. Dressler, 112 Fed. 2nd, 977-978 (Seventh Circuit).
Niederluecke v. U. S., 21 Fed. 2nd 511 (Eighth Circuit).
Neff v. U. S., 105 Fed. 2nd 688 (Eighth Circuit).
Edward v. U. S., 18 Fed. 2nd 402 (Eighth Circuit).
Giantos v. U. S., 104 Fed. 2nd 929 (Ninth Circuit).
MacLafferty v. U. S., 77 Fed. 2nd 715 (Ninth Circuit).
Cromley v. U. S., 8 Fed. 2nd 118 (Ninth Circuit).
Baish v. U. S., 90 Fed. 2nd 988 (Tenth Circuit).
Hood v. U. S., 59 Fed. 2nd 153 (Tenth Circuit).
Stewart v. U. S., 104 Fed. 2nd 234 (U. S. Circuit Court of Appeals, District of Columbia).

Borum v. U. S., 56 Fed. (2nd) 230 (U. S. Circuit Court of Appeals District of Columbia).

It is thus seen that in recent years practically all the Circuit Courts of Appeals have said such proof is inadmissible.

This is, we believe, a universal rule recognized by all courts and authorities.

In the famous *Molineux* case, 168 N. Y. 264, the New York court said:

> "This rule so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta."

Mr. Wigmore, in discussing the rule (Vol. 1, Third Edition, Sec. 57, p. 456), says:

> "The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court. There are also indirect and more subtle disadvantages. The rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character."

Wharton's Criminal Evidence (Tenth Edition), Section 29, says this of the rule:

> "To admit evidence of such collateral facts would be to oppress the accused by trying him on charges, of the nature and cause of which he has not been informed and which he has made no

preparation to meet, and by prejudicing the jury against him through the publication of offenses of which, even if guilty, he may have long since repented, or which may have long since been condoned."

Mr. Wharton, in the same section, comments on the exceptions to the rule, and when these (he names nine) are examined it is easily seen that the proof here complained of was not admissible under or because of either or all these exceptions.

In its discussion of the rule and its application, 20 Am. Jur., pp. 287-288-289, cites cases from thirty-two states in which the rule has been upheld and applied.

Underhill, on Criminal Evidence (Fourth Edition), Sec. 180, says this of the rule and its application:

"The large majority of persons of average intelligence are untrained in logical methods of thinking, and are therefore prone to draw illogical and incorrect inferences, and conclusions without adequate foundation. From such persons jurors are selected. They will very naturally believe that a person is guilty of the crime with which he is charged it is proved to their satisfaction that he has committed a similar offense, or any offense of an equally heinous character. And it cannot be said with truth that this tendency is wholly without reason or justification, as every person can bear testimony from his or her experience, that a man who will commit one crime is very liable subsequently to commit another of the same description. To guard against this evil, and at the same time to avoid the delay which would be incident to an indefinite multiplication of issues, the general rule (to which, however, some very important exceptions may be noted) forbids the introduction of evidence which will show, or tend to show, that the accused has committed any crime wholly independent of that offense for

which he is on trial. Generally it is error to admit evidence independent of the particular crime charged of other offenses, or the evidence of prior conviction for other offenses."

22 C. J. S., pp. 1084-1087, in its treatment of the rule, says:

> " * * * that accused must be tried for one offense at a time, and that, in accordance with the more extensive general rule, *which applies to all cases* civil or criminal, the evidence must be confined to the point in issue." (Italics supplied).

Then is cited, in support of the text, cases from forty-six states and the District of Columbia, including all the states, and the District, in the Fourth Circuit.

One of the last expressions on the rule we have found from any Circuit Court of Appeals is that from the Sixth Circuit, in *Eley v. U. S.*, 117 Fed. 2nd 528-529, in which that court says:

> "The admission of evidence of convictions unrelated in time or of specific acts was error. It may not be justified by the rule applicable to cases where guilty knowledge or intent is an essential element of the crime charged so that acts similar in character and related in time may aid in disclosure of intention. Convictions in 1930 can have no possible bearing upon alleged law violations in 1938, and accusations of specific law violations in 1938, with which the appellant is not charged, and of which he does not stand convicted, must be excluded on the often asserted ground that while an accused must be prepared to meet an attack upon his character as evidenced by his reputation, he cannot fairly be required, without notice, to defend against every possible aspersion which may be made against him. *Nor can proof of an unlawful act, wholly unrelated to*

the crime charged, be considered admissible on any ground. * * * (Italics supplied).

* * *

"We are unable to follow the reasoning of the court which led it to admit the challenged evidence not to establish specific acts but for the limited purpose of showing the general reputation of the defendant. There was no proof that the prior convictions and the subsequent unlawful acts of the appellant were known to the community, or that they in any wise impaired the reputation of the appellant as a man of honesty and integrity. Nor was the door opened to the inadmissible evidence by the introductory statement of counsel that the appellant had led an exemplary life since his conviction in 1930. Were we so to hold, the vice in such ruling would readily become apparent. It would permit zealous prosecutors to review the history of the accused, from cradle to the trial, upon the mere statement of his counsel, inadvertent or designed, that he was a man of good character, and once convicted a fair trial would no longer be open to him as a means of repelling false accusations."

Enough has been said to show the admission of the evidence complained of violated the well-established rule, and that the decision approving its admission is in direct conflict with decisions of the other nine Circuit Courts of Appeals, and of the Court of Appeals of the District of Columbia.

(a) Because of this conflict it is submitted the writ should be issued.

Even a guilty man is entitled to a fair trial. And an innocent man is doubly aggrieved and wronged when denied a fair trial, first, because of the denial of the right, and, second, because he has every reason to expect acquittal if given a fair trial, whereas, often, as here, he is convicted when his rights are violated.

II.

This court decided this question in precisely the different way,—that is, held such evidence of other alleged, unrelated crimes inadmissible, and reversed the Circuit Court which had convicted the accused.

Almost exactly fifty years ago (that is, in 1891), this court, speaking through Chief Justice Fuller, decided *Boyd v. U. S.*, 35 Law Ed. 1077-1080, and, in reversing Boyd's conviction, laid down this court's conception of the rule against the admission of evidence of other unrelated and irrelevant crimes or offenses. The court said:

> "But we are constrained to hold that the evidence as to the Brinson, Mode, and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we

> have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

So far as a somewhat thorough search of its opinions discloses, the court has not unsaid what it then said, nor modified or qualified it. Apparently the court has not since then had occasion to rule upon the question.

The court, in 1926, decided a case somewhat akin to that at bar, but unlike it in one significant particular.

The case was *Raffel v. U. S.*, 70 Law. Ed. 1054, and the opinion is by (then Mr. Justice, now) Chief Justice Stone. Raffel was convicted by the District Court of Kentucky, and the Circuit Court of Appeals of the Sixth Circuit certified to this court a question about evidence. The question certified was: "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, *to disclose that he had not testified as a witness in his own behalf upon the first trial?*" (Italics ours.)

The italicized portion of the question shows the distinction between that case and the one now considered. The accused was asked about something occurring or not occurring at a former trial of the same case. Of course, that was relevant, was not unrelated, independent of the case being tried.

Here Dr. Simon was cross-examined as to matter wholly distinct from the question being tried, concealment of assets in bankruptcy, and entirely disconnected from the issue. What possible connection or relevancy can there be in a trial on the indictment against petitioner and his passport in 1927, or income tax returns for the years 1936 and 1937?

(b) The writ should issue because of this conflict.

III.

If it shall be found that the precise question here presented has not been settled by this court, was not settled by the Boyd case, then, assuredly, it is one of such prime importance as should be settled.

(c) If it be considered that because the objectionable evidence was adduced upon cross-examination of the accused, offering himself as a witness in his own behalf, calls for an application of the rule, or exceptions to the rule different from that in the Boyd case, still this court should settle the question.

If the court, because of what has been last said, believes the question has not been settled by this court, then we rspectfully invite the court's attention to what is said in *V.* hereof.

IV.

The decision is in direct conflict with other recent decisions on the same question of the Circuit Court of Appeals of the Fourth Circuit.

In *Caldwell v. U. S.*, 78 Fed. 2nd 289, the Circuit Court of Appeals, in commenting on evidence which was admitted concerning a conviction ten years before on a charge similar to that then being tried, the court said: "The admission of this evidence was reversible error." Reversed.

In *Simpkins v. U. S.*, 78 Fed. 2nd 594, decided in 1935, by the Circuit Court of Appeals of the Fourth Circuit, the court, in reversing the conviction of Simpkins, said:

> "Proof of offenses other than those charged in the indictment is generally inadmissible and constitutes prejudicial error, even though the separate offenses may be of a similar nature * * *. Character of defendant is not to be put in issue by the government unless the defendant first makes the issue on his behalf."

If proof of similar, but different, offenses is inadmissible and calls for reversal, by what process of reasoning is proof of wholly dissimilar and unrelated offenses considered admissible?

In *Walker v. U. S.*, 104 Fed. 2nd, 465, in reversing the trial court, which had convicted defendants for violation of liquor laws, the court said:

> "There was also a great deal of evidence admitted tending to show that in 1933-35, * * * the appellant McKay assisted in the operation of a still and also raided several stills and appropriated the captured liquor to his own use. This evidence was, of course, prejudicial."

(d) If this court did not have other and better reasons for reviewing the decision now considered, it would seem that the need for uniformity in the decisions on the question in the Fourth Circuit is a sufficient reason for granting the writ.

V.

It is argued there is a distinction in the application of the rule when the objectionable evidence is elicited, upon cross-examination, from the defendant when testifying in his own behalf. The opinion considered makes this distinction.

In consideration of petitioner's assignment of this as error calling for reversal, the Circuit Court of Appeals said (P. R. 241):

"It is a sufficient answer to this that no such objection was interposed at the time."

This is correct as to the passport, but incorrect as to the income tax returns.

The admission of the 1937 return was objected to, but perhaps the objection was not insisted upon so much as is desirable (P. R. 76). As to the 1936 return, however, there was objection and exception. The Solicitor General, in the stipulation made part of the record (P. R. 246 — Stipulation 4), admits this.

The opinion then says the cross-examination was proper, as the tax returns tended to show ownership by the defendant in the property, and the oaths here and as to his birth in the visa were proper, "with a view of testing the credibility of the defendant who was testifying in his own behalf."

We are at loss to see how the court find in the income tax returns any evidence tending to prove concealment of assets in a bankruptcy proceeding, and believe undeniably the proof as to these returns was proof of wholly unrelated, disconnected offenses, if offenses they are, as the effort was to show them to be.

In support of its ruling as to the oaths to the returns and the visa, the court apparently chiefly relies on its own decision in an earlier case, which it quotes from at some length. The case is *Pullman Co. v. Hall*, 55 Fed. 2nd 784. An examination of the opinion plainly shows the distinction between it and the case at bar. Hall, the plaintiff (it was a civil action) *in the same case*, had made an affidavit in the state court, before removal, to gain consent to prosecute *in forma pauperis*.

Thus it is seen that Hall, as in the *Raffel* case, 70 Law. Ed. 1058, was cross-examined concerning something which

occurred *in the case then actually being tried.* Of course, this was competent, and a recognized exception to the rule. The case is not authority justifying the improper and prejudicial examination of petitioner.

The applicable rule is: When the accused offers himself as a witness in his own behalf, he may be cross-examined, as other witnesses, but may not be examined as to other alleged crimes or offenses wholly independent of the charge for which he is being tried, unless he has himself put his character in issue.

Wigmore on Evidence (Third Edition), Vol. 3, Sec. 983.
A. L. I. Code of Evidence, Tentative Draft No. 2, Rule 106 (3).
Criminal Evidence Act (English), Art. 56.
28 R. C. L., p. 621.
Roscoe's Crim. Ev. (Eleventh Edition), pp. 95-182.
Houghton v. Jones, 17 Law. Ed. 503.
Jones on Evidence (Fourth Edition), Vol. 3, Secs. 820a and 841.
U. S. v. Glasser, 116 Fed. 2nd, 690-702. (Seventh Circuit).
Little v. U. S., 93 Fed. 2nd 401 (Eighth Circuit).
U. S. v. Weiss, 103 Fed. 2nd 348 (Second Circuit).
Weiner v. U. S., 20 Fed. 2nd 522 (Third Circuit).
Sutherland v. U. S., 92 Fed. 2nd 305 (FOURTH CIRCUIT).

The Circuit Court of Appeals supports its decision by citing Wigmore, Second Edition.

Evidently Mr. Wigmore, if ever entertaining the opinion that the proof here complained of was admissible, has changed that opinion.

(a) His Third Edition, at considerable length, discusses the rules in various jurisdictions as to how far the prosecution may proceed when cross-examining the accused.

He examines and discusses several of them. Section 983 discusses what he calls the third type of rule. The entire section is set out as Appendix 2 herewith, for the court's convenience. This type of rule, he says, *prohibits entirely* cross-examination as to character of the accused, and he concludes his comment with this:

> " * * * the rule of total prohibition of cross-examination, as well as extrinsic testimony, on these matters, has thus received sanction, and is perhaps the most consonant with the needs of the time."

(b) The American Law Institute, through its council, submitted to its members, in May, 1941, its second draft of a Code of Evidence. The Reporter for this work is Edmund M. Morgan, of Harvard. The Chief Consultant is John H. Wigmore, of Northwestern. Two Judges of the Circuit Court of Appeals of the Second Circuit are advisers, and several Circuit Judges are general consultants. Proposed Rule 106, Section 3, was:

> "(3) For the purpose of impairing the credibility of an accused in a criminal action who testifies at a trial therein the accused shall not at that trial be examined, nor shall any evidence be admitted, as to facts tending to prove his commission or conviction of another crime, unless he has first introduced evidence of his good character to support his credibility."

Obviously this Council, including Morgan, Wigmore, and many Circuit Judges, would say the evidence elicited by cross-examination from petitioner as to other alleged crimes was incompetent and inadmissible.

(c) Beers Edition of Stephen's Digest of the Law of Evidence shows that England has, by statute, adopted the concept here contended for. Article 56 says, in part:

"A person charged with an offense and called as a witness * * * may not be asked * * * any question tending to show that he has committed or been convicted of, or been charged with any offense other than that whereof he is charged, etc."

The whole of the Article is made Appendix 3 for the convenience of the court.

(d) In the Hall case, there is cited in support of the ruling 28 R. C. L. 607. This relates only to witnesses and does not refer to examination of the accused. 28 R. C. L. 621 does refer to witnesses in criminal trials, and to cross-examination of the defendant. It reads, in part:

* * * "Cross examination as to other separate and distinct transactions and offenses is not permissible unless they are relevant and material to the case. This is necessary to prevent a conviction for one offense by proof that the accused may have been guilty of others. Inquiries that may tend to disgrace an ordinary witness, and thereby discredit his testimony, can prejudice him in no other way; they operate to the prejudice of the party on trial only in that they may lessen the weight of testimony on which he relies. But where an accused takes the stand their inevitable effect is to create prejudice against him. A defendant in a criminal case cannot be questioned as to matters wholly remote from the question of guilt and innocence of the crime, so as to amount to a general assault upon his character." * * *

(e) Roscoe's Criminal Evidence (Eleventh Edition), page 95, has this on the subject considered:

"Proof of specific acts of crime or misconduct is generally not admissible for impeachment."

(f) More than once in its opinion the Circuit Court of Appeals says petitioner was subject to cross-examination,

"the same as any other witness." Many years ago this court defined the rule as to cross-examination. In *Houghton v. Jones*, 17 Law. Ed. 503, the court said:

> "The rule has long been settled, that the cross-examination of a witness must be limited as to the matters stated in his direct examination."

Certainly nothing in petitioner's direct examination in the remotest degree stated anything about income tax returns or passports.

(g) Jones on Evidence in Civil Cases (Fourth Edition), Sec. 820a (p. 1516 of Vol. 3), has this:

> "The American rule, restricts cross-examination to facts and circumstances which are connected with the matters that have been stated in the direct examination of the witness."

And Sec. 841, p. 1554 of the same volume says:

> "Where the party becomes a witness in his own behalf in a criminal case the rules which govern his cross-examination are those which obtain in a civil case. According to the weight of authority, the cross-examination should extend only to those matters which have been referred to in the direct examination."

(h) We now set forth the recent rulings and decisions of four Circuit Courts of Appeals on the precise question here considered.

The Eighth Circuit, in *Little, et als. v. U. S.*, 93 Fed. 2nd 401, reversed the conviction of Maxey, one of the defendants, because Maxey had been cross-examined as to another independent alleged crime, saying:

> "That kind of cross-examination is error, under the decisions of this court (citing five other

cases) and when indulged in the government will not be heard to say that such cross-examination is not prejudicial error."

The Third Circuit, in *Weiner v. U. S.*, 20 Fed. 2nd 522, said:

"Some United States Attorneys, when prosecuting for violations of the National Prohibition Act (Comp. St. § 10138 ¼ et seq.), show a disposition to depart as far as they safely can from the rule which limits cross-examination of the defendant as to prior criminal convictions solely to an attack upon his credibility as a witness (when, as in this case, he has not put his character in issue) and to endeavor thus to lodge in the minds of the jurors the thought that, as the defendant has confessed a previous conviction for the commission of a similar crime, it is likely he committed the one for which he is on trial.

"The law has long been settled that evidence of the commission of one crime cannot be used to prove the defendant committed another. Wigmore on Evidence, § 192; Regina v. Oddy, 2 Denison Cr. C. 264; Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; Taliaferro v. United States (C.C.A.) 213 F. 25; Dyar v. United States (C.C.A.) 186 F. 614. To this rule there are exceptions, for instance, when two offenses are inseparably connected and evidence of the first tends directly to prove the second. Astwood v. United States, 1 F. (2d) (C.C.A. 8th) 639, 642. The rule against the admissibility of evidence of one crime to prove another is equally applicable whether the evidence is elicited from witnesses for the prosecution or from the defendant himself. But when the defendant takes the stand in his own defense, he offers himself as a witness and, like all witnesses, submits himself to attack as to his credibility. For this purpose alone he may be asked, and be compelled to answer, questions as to the fact of previous convictions. And in this way his testimony may lawfully be weakened. It is just here

that trouble arises, for not infrequently a prosecuting attorney will, if allowed, proceed further and explore the defendant's record in an endeavor to compare the facts of two unrelated cases and prove the one on trial by the one confessed. This, we have repeatedly held, is wrong. Beyer v. United States (C.C.A.) 282 F. 225, 227; Mansbach v. United States (C.C.A.) 11 F. (2d) 221, 224."

In January of this year, the Circuit Court of Appeals (Seventh Circuit) decided U. S. v. Glasser, 116 Fed. 2nd 690 (now pending here), and said (702):

> "It is not permissible, under the guise of testing the credibility of a defendant, to question him on cross-examination about matters not touched upon in the examination in chief nor pertinent thereto, not tending to prove the charge upon which the defendant is being *charged.*" (The last word clearly is a misprint, and should be "tried").

The Circuit Court of Appeals for the Fourth Circuit (whose decision is now considered), in 1937, decided *Sutherland v. U. S.*, 92 F. 2nd 305. In that case was presented the precise question we are now discussing. Sutherland was a witness in his own behalf, and, on cross-examination, he was asked about other alleged similar offenses (liquor offenses) occurring about one year before. In reversing his conviction, the court said:

> "And the testimony as to the prior offense is not relevant on the theory that it was in contradiction of the evidence of defendant. His direct examination was confined to a denial of the specific crime charged; and nothing is better settled than that a witness, whether a party or not, may not be asked questions as to irrelevant matters on cross-examination for the purpose of contradicting his answers and thus discrediting him.

70 C. J. 805; United States v. Dickinson, 2 McLean 325, 25 Fed. Cas. 850, No. 14,958; Odiorne v. Winkley, 18 Fed. Cas. 581, No. 10,432."

If it was well settled in the Fourth Circuit, in 1937, that it could not be done, one is curious to know what occurred in the four year interim to make such evidence admissible.

If, as decided in the Sutherland case, it was error in the cross-examination of Sutherland (being tried for concealing and removing distilled spirits) to ask him about liquor found on his premises a year before trial, then was it not even greater, or more manifest, error to ask Simon about other, *and wholly dissimilar offenses*, alleged to have been committed by him thirteen and three years before his trial?

VI.

The conclusion is inescapable that the appellate court did not give to this case, the record and the applicable law, the careful consideration and painstaking care for which it has all along been noted, and which petitioner had the right to expect, since his liberty is at stake.

Some instances of erroneous reasoning have been noted. Others are these:

1. The opinion contains a lengthy quotation from the opinion in Coulston v. U. S., 51 Fed. 2nd 178—cited as supporting.

To the contrary, the opinion in the Coulston case was precisely the opposite.

Coulston was cross-examined about other offenses. After discussing the governing rule (held to be as contended for herein), Judge McDermott said:

"Tested by these rules, the questions asked on cross-examination were improper."

Defendant was tried for violation of the Narcotic Law, and the objectionable questions were about other purchases of morphine. The opinion says:

> "Neither of the transactions proven on rebuttal had the slightest connection with the sale for which defendant was tried. *In our judgment this was prejudicial error*". *The conviction was reversed.* (Italics ours).

2. Another case cited by Judge Dobie, as supporting his court's decision on this point, is *U. S.* v. *Sager*, 49 Fed. 2nd 723. To the contrary, that decision is precisely the opposite. Sager was convicted and, *in reversing*, Judge Manton said:

> "Admission made by Sager as to the crime for which he was on trial or matters relating to that specific offense were material and competent. But these indiscriminate references to previous trials, bailiffs and bondsmen, the giving of money at prior trials" (the charge on trial was bribing a juror); "association with disbarred lawyers, and inquiries as to whether he was justly disbarred, were all collateral matters and improperly received and we think prejudicial to defendant's case."

Clearly, if the case now considered had been heard on appeal in the Tenth or Second Circuits, the conviction would have been reversed, for the very reason we urge petitioner's conviction should be reversed.

3. The Circuit Court of Appeals concludes its opinion with an excerpt from the charge of the trial judge (P.R. 243).

The opinion implies this portion of the trial judge's charge prevented the jury from considering the evidence now complained of. We cannot agree—but on the contrary. Observe that the trial judge said:

> " * * * and if he has committed other crimes, that alone is not sufficient to convict him of the charges in this indictment."

The use of the word "alone" plainly told the jury it might consider the proof as to other crimes, and did not take from its consideration the inadmissible evidence.

> Then the judge said, "Different matters have been introduced in the record here for the purpose of showing the *conduct* of the defendant, and for the purpose of giving the jury a picture as to his *conduct*, and his statements, in order that the jury may determine what weight to give his testimony."

The employment, two different times, of the word "conduct", refutes the argument made that the incompetent evidence was admitted only to impeach the defendant or to discredit his testimony. The new Standard Dictionary defines *conduct:*

> "The way in which a person acts or lives; the doings or deeds of a person, collectively considered; behavior; deportment".

Therefore, when the trial court told the jury the evidence as to passport and income tax returns was admitted to show petitioner's *conduct*, and that this evidence *alone* was not sufficient to convict, it very plainly told the jury to consider the doings and deeds, the behavior and deportment of the accused in reaching its verdict. As we view it, this charge, instead of curing the error in admitting the evidence, magnified and emphasized it.

VII.

Respondent will argue the admission of this incompetent evidence was not prejudicial to petitioner; because, it will be argued, there was other ample proof, which was admissible, of petitioner's guilt. Such argument is plain sophistry. As well argue one tried for murder ought not be convicted, because the victim was afflicted with an incurable malady, could only live a short time, and, therefore, it was not murder to kill him. Any court, to determine whether or not there is substantial proof that the petitioner "knowingly and fraudulently concealed from the trustee" (to quote verbatim the statute) assets or made a false oath in relation thereto, would need to examine the entire record. Under its rule, this court will make no such examination. We submit the record, as made, on competent evidence, is wholly without proof the petitioner is guilty of any of the charges in the indictment—and that an impartial reading of the record clearly shows this, notwithstanding the decision of two courts to the contrary. The printed portion of the record here made of the appendix of petitioner's brief in the Circuit Court of Appeals (P. R. 19 to 194), in great measure, shows this — the whole record (typewritten) before this court conclusively shows it.

The supplement to Appellee's brief (the government) filed with the Circuit Court of Appeals is found in the printed record accompanying this petition (P. R. 199-232). A cursory examination of that supplement discloses it is almost, if not wholly, without value as showing what the evidence touched upon and referred to was. It will be seen that a sentence or two, or a few questions and answers, are lifted from the testimony of thirty-four witnesses, all boiled down to thirty-three pages—less than a page to a witness. It is estimated the whole of the testimony of these thirty-four witnesses covers more than one thousand pages.

What was done was to lift a sentence or two, or a few questions and answers (always those, of course, which best served respondent's purpose) from the testimony of the witnesses. Take, for instance, page 201. On this page is printed *testimony* from four witnesses, the court and the Assistant District Attorney (the witnesses being Thompson, Ritchie, Anderson, and Clifton). No court and no one could even guess as to the sum total or the evidential weight and effect of a witness' testimony from such meager parts of it as is copied into this supplement. No court can or will accept this as a fair, proper, intelligent, and helpful narration of what a witness testified. It can only cause a search of all the witness said, if the searcher is to know.

As evidence *something* other than competent evidence influenced the jury to return its verdict of guilty, we cite these facts:

The trial lasted eight days, more than fifty witnesses were examined, and the record, including exhibits, covers more than fourteen hundred pages. Yet the printed record shows that when the case was given to the jury to " * * * see if you can't reach a verdict before supper" (P.R. 192), this occurred: (The two alternate jurors were excused, and the jury retired to their room to consider of their verdict at 5:23 P. M.) (P.R. 192).

(At 5:36 P. M., the jury returned to the court room, and the following proceedings were had):

This, from the court reporter's notes, shows the jury returned, after being in its room *but thirteen minutes*, and the proceedings show, by the questions asked by the foreman, that *already* the jury had reached a verdict of "guilty" on all seven counts. The question of the foreman (in view of the verdict returned later) showed the jury was in agreement and wanted only to know if finding the defendant

guilty on the first two counts " * * * automatically make him guilty of six and seven". (Counts Six and Seven charged false swearing as to Counts One and Two).

Thereafter (the record does not show how soon—but the time is plainly indicated by the foregoing) the jury returned its verdict (P. R. 15), finding the defendant guilty on all seven counts.

This means that because of *something* (and we insist something other than competent proof), the jury in thirteen minutes, reached a verdict which, under the statute, would have authorized the court in sentencing petitioner to thirty-five years' imprisonment, and to fines aggregating Thirty-five Thousand Dollars ($35,000.00).

For what? The alleged concealment of assets from his trustee, when no creditor lost one cent, and no one, other than this petitioner, sustained any injury or loss; and all the substantial proof shows, *as a matter of law*, there was no concealment of any asset. The trial court refused to see this, gave the case to the jury, including the damaging, prejudicial, incompetent proof of other offenses. With the result shown.

Here again we refer to the Boyd case, *supra*, and point to other particulars in which there is parallel with this case. The trial court (as shown in 35 Law. Ed. 1079) explained to the jury why it admitted proof of certain robberies, the proof being admittedly competent, then said the defendants are not to be convicted "because of the commission of these other crimes" (observe the word "alone" was not used), and obviously there referred to proof of three other robberies, the proof as to which was incompetent. Already we have seen this court held this prejudicial and reversed the conviction, although apparently there was little, if any, proof other than that of guilt of the charge being tried.

In *Little v. U. S.*, 73 Fed. 2nd 866, the Circuit Court of Appeals of the Tenth Circuit, where incompetent evidence was admitted, and the contention was made by the prosecution that since there was no proof the evidence was prejudicial, its admission did not warrant reversal, said this:

> "We conclude that where the entire record affirmatively discloses that an error has not affected the substantial rights of an appellant, it will be disregarded. But where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. So to hold would, as a practical matter, take from a defendant his right to a fair trial." * * *

In *Vicksburg & M. R. R. Co. v. O'Brien*, 30 Law Ed., 299-300, in a similar situation (except it was a civil case, and the rule is believed to be the same), this court said:

> " * * * it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not prejudice the rights of the party."

Here not only does it not appear the petitioner was not prejudiced, but it is submitted there is every probability, if not actual evidence, he was prejudiced by the error.

In *McCandless v. U. S.*, 80 Law. Ed. 1205 (another civil case), this court, after discussing the application of Title 28, Sec. 391, U. S. C. A., to an erroneous ruling on evidence, said this:

> "This, as the language plainly shows, does not change the well settled rule that an erroneous ruling which relates to the substantial rights of

a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial."

Assuredly the substantial rights of the petitioner were affected adversely when the trial court allowed the prejudicial evidence to go to, and be considered by the jury.

In *Williams v. Great Southern Land Co.*, 72 Law. Ed. 761-767, this court, in deciding a case on the improper admission of evidence, had this to say:

> "The judgment was properly reversed on account of these errors. This was not affected by the provision of § 269 of the Judicial Code, as amended in 1919 (February 26), that in an appellate proceeding judgment shall be given after the examination of the entire record, 'without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties.' The errors in the exclusion and admission of evidence directly affected the substantial rights of the company. Since the passage of this act, as well as before, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties, 'is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party.' United States v. River Rouge Improv. Co. 269 U. S. 411, 421, 70 L. ed. 339, 346, 46 Sup. Ct. Rep. 144. Here it cannot be said from the entire record that the errors were harmless; but on the contrary they were material and of a highly prejudicial character."

24 C. J. S., Sec. 1915, pp. 954-957, has this to say as to the admission of prejudicial evidence and the consequence thereof:

> "The erroneous admission of evidence, if it may have operated to the prejudice or harm of

accused, or deprived him of a fair trial, necessitates a reversal of the conviction, where the record shows nothing which can fairly be said to cure the effect of such evidence; whether such error is prejudicial is gauged by the substance of the evidence, its relation to other evidence, and the peculiar facts and circumstances of the case, and whether such admission is sufficient ground for reversal depends on the facts in each case; and the appellate court will consider the record as a whole in determining the question of prejudice or reversibility. The fact that evidence other than that which was improperly admitted is sufficient to justify a conviction does not make the admission of the incompetent evidence harmless, since it cannot be said what weight the jury gave to the evidence in reaching its verdict. The reviewing court will reverse a conviction where it cannot say from the record that the evidence erroneously admitted was not prejudicial to accused, or that it did not affect, or contribute to, the verdict rendered; where the improper evidence tends to disparage the effect of the accused's theory or his evidence, or impinges on a defense offered by him * * * ."

VIII.

It is purposed now to advance the reasons, supported by authority, why it is confidently contended the court will take notice of the improper admission of evidence about the passport, and application therefor.

Earlier herein is pointed out the fact objection, at the time, was made to evidence concerning the income tax returns for 1936 and 1937, proper exception saved on the ruling as to the former; and motions twice made for a directed verdict for defendant on each count in the indictment.

No objection was at the time made to the passport evidence, but it is respectfully urged that since this evi-

dence adversely affects substantial interest of petitioner, and doubtless influenced the jury in its verdict, this court will consider it just as if formal objection had been made and exception saved when the evidence was admitted.

In *Lamento v. U. S.*, 4 Fed. 2nd 904, the Circuit Court of Appeals for the Eighth Circuit, in discussing a similar situation, said:

> "Counsel for the government called to our attention, and we have not failed to note and consider, the fact that no objections or exceptions were taken to the charge of the court at the trial regarding the questions which have been considered and counsel for the government have invoked the general rule that in ordinary cases the appellate courts will not consider errors later called to its attention. Robilio v. United States (C.C.A.) 291 Fed. 975, 980, 981. But there is an exception to this rule as well established, as just and equitable, as the rule itself. It is that in criminal cases, involving the life or liberty of the accused, the appellate courts of the United States may notice and correct, in the interest of a just enforcement of the law, serious errors in the trial of their cases, fatal to the defendant's rights, although these errors were not challenged or reserved by objections, exceptions, or assignments of error. Wiborg v. United States, 163 U. S. 632, 658, 16 S. Ct. 1127, 1197, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207, 221, 25 S. Ct. 429, 49 L. Ed. 726; Crawford v. United States, 212 U. S. 183, 194, 29 S. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; Weems v. United States, 217 U. S. 349, 362, 30 S. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705; Sykes v. United States, 204 F. 909, 914, 123 C.C.A. 205; August v. United States, 257 F. 388, 168 C.C.A. 428; Skuy v. United States, (C.C.A.) 261 F. 320; Clark v. United States (C.C.A.) 265 F. 104; McNutt v. United States (C.C.A.) 267 F. 670; McWhorter v. United States (C.C.A.) 299 F. 780, 781.

"Let the judgment below be reversed, and let the case be remanded to the court below, with instructions to grant a new trial."

In *Wiborg v. U. S.*, 41 Law. Ed. 298, this court said:

"No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."

And in *U. S. v. Atkinson*, 80 Law. Ed. 557, the court said this:

"In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. See New York C. R. Co. v. Johnson, 279 U. S. 310, 318, 73 L. ed. 706, 710, 49 S. Ct. 300; Brasfield v. United States, 272 U. S. 448, 450, 71 L. ed. 345, 346, 47 S. Ct. 135." * * *

And why should not an appellate court notice obvious errors, seriously and vitally affecting the fairness of the trial and the interest of the defendant when his liberty is at stake?

The trial of a criminal case is not a contest of skill and wits between opposing counsel, but is, and is presumed to be, an honest, sincere effort to determine the guilt or innocence of the defendant on the charge on which he is

tried, without serious weight being given to technicalities or strict application of the rules of evidence.

> "Where prejudicial error is obvious in a criminal case, appellate courts should of their own motion recognize it and give protection against an unlawful conviction."
>
> —Ray v. U. S., 114 Fed. 2nd 508.

In *Strader v. U. S.*, 72 Fed. 2nd 590, the Circuit Court of Appeals of the Tenth Circuit reversed and remanded, saying:

> "Appellate Court may correct serious errors involving accused's life or liberty, though not challenged and preserved for review by proper objection, exception and assignment."

To the same effect, *Danaher v. U. S.*, 39 Fed. 2nd 325.

> "Ordinarily, error occurring during a criminal trial must be called to the attention of the trial court to be reviewed on appeal, but where life or liberty is involved appellate court may notice serious error which was plainly prejudicial though it was not called to the attention of the trial court."
>
> —Suhay v. U. S., 95 Fed. 2nd 890.

The court's attention is directed to the fact that only a few minutes before the inadmissible testimony as to passport was procured by cross-examination (P. R. 83), the court, over petitioner's objection, had admitted testimony, procured in the same way, as to the income tax return for 1937 (P. R. 76). Perhaps petitioner should have required the trial court to rule separately on each offer of incompetent evidence, but he should not be penalized if he accepted in the one case the court's action as indicative of what it would be in each similar case. The court having once ruled adversely as to this type of testimony, it would

seem futile and hopeless to continue to object each time the situation arose.

> " * * * And where he has once objected to the admission of a certain line or character of evidence, he need not make repeated objections to the reception of similar evidence in order to have the ruling of the court in admitting it reviewed."
> —24 C. J. S. (Crim. Law), Sec. 1672 (the concluding sentence thereof), p. 289.

Wharton's Evidence in Criminal Cases (Tenth Edition), Section 53, says:

> "When evidence of a separate, independent crime has been improperly introduced, and it is apparent that the effect of its reception must have been to prejudice the rights of the accused, a charge to the jury to disregard the evidence will not cure the error in admitting it."—Citing *Boyd v. U. S.*, 35 Law. Ed. 430.

In *Brashfield, et al, v. U. S.*, 71 Law. Ed. 345-346, this court said:

> "The failure of petitioner's counsel to particularize an exception to the court's inquiry does not preclude this court from correcting the error."

> "While no motion or request was made that the jury be instructed to find for defendant, and although such a motion is the proper method of presenting the question whether there is evidence to sustain the verdict, yet *Wiborg v. United States*, 163 U. S. 632, 658, 41 L. Ed. 290, 298, 16 Sup. Ct. Rep. 1127, 1197, justifies us in examining the question in case a plain error has been committed in a matter so vital to the defendant."
> —Clyatt v. U. S. (Fifth Circuit), 49 Law. Ed. 731-732.

In *Crawford v. U. S.*, 53 Law. Ed. 465-472, the question before the court was the refusal of the trial court to admit material evidence.

In reversing and remanding the case, this court had this to say:

> "There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that the commission of such an error against a party seeking to review it is not cause for the reversal of the judgment. Deery v. Cray, 5 Wall. 795, 807, 18 L. ed. 653, 657; Smith v. Shoemaker, 17 Wall. 630, 21 L. ed. 717."

It is believed the effect and the ruling are, and should be, the same in admitting incompetent prejudicial evidence as in excluding material evidence.

In *Clark v. U. S.*, 24 Fed. 2nd 696, the court said:

> "Where defendant was given a penitentiary sentence of five years, it is the duty of the appellate court to notice a vital error, though not properly presented."

Here, by reason, it is believed, of the admission of incompetent prejudicial evidence, including that concerning a passport applied for in 1927 (the error in which evidence was not properly presented in the trial court), petitioner was given seven three year sentences (to run concurrently, it is true), and because thereof it is submitted this court should notice and correct the error.

CONCLUSION

Petitioner, by the decision of the Circuit Court of Appeals, affirming the trial court, is being made the victim of miscarried justice. Following the mistaken and erroneous advice of his then counsel, he filed a petition in bankruptcy (P. R. 126). The indictment charged he concealed assets — assets which the record clearly shows he did not own or have. Because of the improper admission of evidence of other unrelated and wholly distinct and independent offenses, the jury, *in thirteen minutes*, reached a verdict of guilty on all seven counts. His objection to the incompetent evidence was overruled. His motions, twice made, for a directed verdict on each count were denied. His effort for a new trial and in arrest of judgment failed. The intermediate appellate court, refusing to follow its own decisions, and this court's decisions on the same question, refused to reverse. He has been denied a fair trial, and his liberty and, what is as precious as life itself, his reputation as an innocent man, hang in the balance and can only be saved to him by the action of this court.

WHEREFORE, it is respectfully submitted that the prayer of his petition should be granted and a writ of certiorari should be issued.

Respectfully submitted,

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Williamson, West Virginia
November 5, 1941.